

No. 14923

In the United States
Circuit Court of Appeals
For the Ninth Circuit 14

JAMES W. MALONEY, Collector of Internal
Revenue of the United States for the District of
Oregon,

Appellant,

vs.

WESTERN COOPERAGE COMPANY, a cor-
poration,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Oregon

Names and Addresses of Attorneys of Record:

CARL C. DONAUGH

United States Attorney for the
District of Oregon

J. MASON DILLARD

Assistant United States Attorney
U. S. Court House, Portland, Oregon
Attorneys for Appellant

CHARLES E. McCULLOCH

FLETCHER ROCKWOOD

CAREY, HART, SPENCER & McCULLOCH
Yeon Building, Portland, Oregon
Attorneys for Appellee

FILED

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PAUL P. DUNN,
CLERK

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For the Ninth Circuit

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JAMES W. MALONEY, Collector of Internal
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Yeon Building, Portland, Oregon
Attorneys for Appellee

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

November Term, 1936

BE IT REMEMBERED, That on the 14th day of November, 1936, there was duly filed in the District Court of the United States for the District of Oregon, a

COMPLAINT

in words and figures as follows, to wit:

In the District Court of the United States
For the District of Oregon

WESTERN COOPERAGE

COMPANY, a corporation,

Plaintiff,

vs.

JAMES W. MALONEY, Collector
of Internal Revenue of the United
States for the District of Oregon,
Defendant.

No. L-12799
COMPLAINT

Now comes plaintiff and makes this its complaint herein:

I.

This action is instituted under Subdivision (5) of Section 24 of the Judicial Code (U.S.C.A. 28:41(5)) to recover taxes on dividends paid by plaintiff in 1933 on

its common stock, erroneously and illegally assessed against and collected and withheld from plaintiff by defendant under an erroneous interpretation and application of the provisions of Section 213 of the National Industrial Recovery Act (48 St. L. 206-207).

II.

Plaintiff is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Oregon, with its principal office at American Bank Building, in the City of Portland, Oregon.

III.

Defendant is and at all times since July 17, 1933, has been the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the District of Oregon.

IV.

On or about January 16, 1933, the Board of Directors of plaintiff, at the regular annual meeting of said Board, at which a quorum of said Board was present, duly adopted and passed a resolution, as follows:

"RESOLVED, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of $\frac{1}{2}$ of 1% each month for the year 1933 whenever in his judgment there are moneys available to

pay the same and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends."

V.

Subsequent to June 16, 1933, the effective date of said Section 213, and prior to December 31, 1933, plaintiff, without any further declaration of dividends other than as made in said resolution of January 16, 1933, and in compliance with the terms of said resolution, paid dividends to holders of its common stock from time to time issued and outstanding, in total amounts as shown in the following tabulation:

Paid in month of 1933	Total divi- dend paid	Par value stock on which divi- dend paid	Per cent of dividend paid
June	\$ 14,883.00	\$2,976,600.00	0.5%
July	14,883.00	2,976,600.00	0.5%
August	14,883.00	2,976,600.00	0.5%
September	14,883.00	2,976,600.00	0.5%
October	14,883.00	2,976,600.00	0.5%
November	14,883.00	2,976,600.00	0.5%
December	29,766.00	2,976,600.00	1.0%
	<hr/>		
	\$119,064.00		4.0%
	<hr/>		<hr/>

VI.

Thereafter, and on or about December 26, 1935, defendant, under an erroneous interpretation and application of said Section 213, assessed against plaintiff additional taxes not theretofore paid by plaintiff, upon the basis of 5 per cent of dividend payments made by plaintiff on its common stock, as alleged in particular in paragraph V hereof. The additional taxes thus assessed by defendant, including interest to December 30, 1935, were as follows:

On dividends paid in month of 1933	Tax Assessed	Interest Assessed
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	1,488.30	309.79
	<hr/>	<hr/>
Total	\$5,953.20	\$1,395.57
	<hr/>	<hr/>
Total Taxes and Interest		\$7,348.77
		<hr/>

VII.

Thereafter, and on or about December 28, 1935, plaintiff paid to defendant, as Collector of Internal Revenue for the District of Oregon, said taxes and in-

terest so assessed in the total amount of \$7,348.77; but said payment was made under specific protest, which was made to defendant at the time of said payment, in form as follows:

“Payment of the above mentioned taxes is made under specific protest and duress and to avoid the seizure and sale of our property under warrant of distraint. It is our claim that the dividends in respect of which the above mentioned taxes are imposed were legally declared prior to the effective date of the taxing act, and that the assessment of these taxes against us is unlawful and improper. We shall hereafter file claim for refund of the taxes herewith paid.”

VIII.

Thereafter, and on or about February 21, 1936, and within the time allowed by law, plaintiff presented to and filed with the Commissioner of Internal Revenue its claim upon Form 843 of the United States Treasury Department, Internal Revenue Service, provided for said purpose, for refund of \$6,449.72, being a part of said \$7,348.77, taxes and interest so paid under protest as alleged in paragraph VII hereof. The said amount of \$6,449.72 was made up of (a) \$5,209.05, which is 5 per cent of all dividends paid by plaintiff on its common stock, as alleged in paragraph III hereof, not in excess of one half of one per cent, in any single month, of the par value of common stock outstanding in said month, and (b) \$1,240.67, interest as paid by plaintiff

on said sum of \$5,209.05. In particular said amount of \$6,449.72 included taxes and interest as assessed by defendant and as paid by plaintiff, as shown in the following table:

On dividends paid in month of 1933	Taxes Assessed and Paid	Interest Assessed and Paid
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	744.15	154.89
Total	<u>\$5,209.05</u>	<u>\$1,240.67</u>
Total Taxes and Interest		<u>\$6,449.72</u>

Thereafter, by letter dated March 27, 1936, addressed and mailed to plaintiff, the Deputy Commissioner of Internal Revenue advised plaintiff that said claim for refund would be disallowed. Thereafter, as required by law, by letter dated May 22, 1936, addressed to plaintiff at 1233 American Bank Building, Portland, Oregon, forwarded by registered United States mail, the Commissioner of Internal Revenue notified plaintiff that said claim for refund was disallowed or rejected.

X.

On January 16, 1933, plaintiff's earned surplus was \$800,416.81, and on March 1, 1913, plaintiff's earned surplus was \$173,100.48. The portion of earned surplus on January 16, 1933, accumulated subsequent to March 1, 1913, was \$627,316.33.

XI.

Total dividends paid by plaintiff during the calendar year 1933, subsequent to January 16, 1933, were as follows:

To holders of plaintiff's common stock	\$193,492.00
To holders of plaintiff's preferred stock	7,504.00
	<hr/>
Total	\$200,996.00

XII.

During the year 1933 plaintiff's earned surplus, available for dividends payable thereafter, as of the last day of certain months, was as shown in the following table:

As of last day of 1933	Earned Surplus
May	\$724,125.81
June	707,366.81
July	692,390.01
August	677,507.01
September	660,841.81

October	645,958.81
November	631,075.81
December	546,515.12

At all times during the year 1933 there was money available in plaintiff's treasury to pay dividends on its common stock in amounts not less than one half of one per cent per month on all outstanding common stock. At no time during the year 1933 was cash owned by plaintiff on deposit in solvent banks less than \$100,000.00.

WHEREFORE, plaintiff demands judgment against defendant for the sum of \$6,449.72, plus interest thereon from December 28, 1935, and for plaintiff's costs and disbursements herein.

CHARLES E. McCULLOCH
 FLETCHER ROCKWOOD
 CAREY, HART, SPENCER
 & McCULLOCH

Attorneys for Plaintiff.

STATE OF OREGON,)
 County of Multnomah.) ss.

I, LOUIS WOERNER, being first duly sworn, on oath depose and say: That I am the Secretary of WESTERN COOPERAGE COMPANY, the plaintiff

in the above entitled action; that I have read the foregoing complaint, know the contents thereof and the same is true as I verily believe.

LOUIS WOERNER

Subscribed and sworn to before me this 13th day of November, 1936.

A. H. MILLER

(NOTARIAL SEAL) Notary Public for Oregon.

My Commission Expires: November 11, 1939.

Filed November 14, 1936

G. H. Marsh, Clerk

By F. L. Buck, Chief Deputy.

AND AFTERWARDS, to wit, on the 2nd day of December, 1936, there was duly FILED in said court, an

ANSWER

in words and figures as follows, to wit:

COMES NOW the defendant above-named, through Carl C. Donough, United States Attorney for the District of Oregon, and J. Mason Dillard, Assistant United States Attorney, and in answer to the complaint heretofore filed in this cause admits, denies, and alleges as follows:

I

Referring to Paragraph I of said complaint, this defendant denies that the taxes mentioned were erroneously and illegally assessed against and collected and withheld from the plaintiff.

II

Referring to Paragraphs II and III of said complaint, this defendant admits the same and the whole thereof.

III

Referring to Paragraphs IV and V of said complaint, this defendant has no information upon which to form a belief and therefore denies the same.

IV

Referring to Paragraph VI of said complaint, this defendant admits each and every allegation therein contained, save and except that said taxes were assessed and collected under an erroneous interpretation of Section 213, National Industrial Recovery Act.

V

Referring to Paragraphs VII, VIII and IX of said complaint, defendant admits the same and the whole thereof.

VI

Referring to Paragraphs X, XI and XII, this defendant has no information upon which to form a belief and therefore denies the same and the whole thereof.

WHEREFORE, this defendant prays that the plaintiff take nothing by reason of its complaint and that this defendant have judgment for his costs and disbursements herein.

CARL C. DONAUGH

United States Attorney

for the District of Oregon

J. Mason Dillard

Assistant United States Attorney.

STATE OF OREGON,)
County of Multnomah.) ss.

I, James W. Maloney, being first duly sworn, depose and say: That I am Collector of Internal Revenue of the United States for the District of Oregon and defendant in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and that the allegations therein contained are true as I verily believe.

James W. Maloney

Subscribed and sworn to before me this 28th day of
November, 1936.

C. W. Olsen

(SEAL)

Notary Public for Oregon

My commission expires: Aug. 11, 1939

UNITED STATES OF AMERICA,)
District of Oregon.) ss.

Service of the within ANSWER is accepted in the
State and District of Oregon this 2d day of December,
1936, by receiving a copy thereof, duly certified to as
such by J. Mason Dillard, Assistant United States At-
torney for the District of Oregon.

Fletcher Rockwood

P.C.

Of Attorneys for Plaintiff

Filed December 2, 1936

G. H. Marsh, Clerk.

By F. L. Buck, Chief Deputy.

AND AFTERWARDS, to wit, on the 19th day of
June, 1937, there was duly FILED in said court, a

STIPULATION

for trial without a jury in words and figures as follows,
to wit:

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys, that the above entitled case shall be tried and determined by the Court without the intervention of a jury.

Charles E. McCulloch
Fletcher Rockwood
Carey, Hart, Spencer & McCulloch
Attorneys for Plaintiff.

J. Mason Dillard
Of Attorneys for Defendant.

Filed June 19, 1937

G. H. Marsh, Clerk.

By H. S. Kenyon, Deputy.

AND AFTERWARDS, to wit, on the 19th day of June, 1937, there was duly FILED in said court, a

STIPULATION OF FACTS

PLAINTIFF'S EXHIBIT 1

CLOYD RAUCH

Reporter

Case No. L-12799

in words and figures as follows, to wit:

Come now the plaintiff by Charles E. McCulloch, Fletcher Rockwood, and Carey, Hart, Spencer & Mc-

Culloch, its attorneys, and defendant by Carl C. Donough, United States Attorney for the District of Oregon, and J. Mason Dillard, Assistant United States Attorney for said District, and stipulate that the following facts may be taken as true at the trial or any subsequent trial hereof:

I.

Plaintiff is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Oregon, with its principal office at American Bank Building, in the City of Portland, Oregon.

II.

Defendant is and at all times since July 17, 1933, has been the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the District of Oregon.

III.

On or about January 16, 1933, the Board of Directors of plaintiff, at the regular annual meeting of said Board, at which a quorum of said Board was present, duly adopted and passed a resolution, as follows:

“RESOLVED, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of $\frac{1}{2}$ of 1% each month for the year 1933 when-

ever in his judgment there are moneys available to pay the same and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends."

IV.

The resolution of January 16, 1933, hereinbefore quoted, was identical in form and substance with resolutions adopted in previous years. Under those resolutions plaintiff had paid dividends amounting to one-half of one per cent each month on its common stock during the entire period from January, 1925, to the close of the year 1933.

V.

Subsequent to June 16, 1933, and prior to December 31, 1933, plaintiff, without a further resolution, paid dividends to holders of its common stock from time to time issued and outstanding in total amounts as shown in the following table:

Paid in month of 1933	Total divi- dend paid	Par value stock on which divi- dend paid	Per cent of dividend paid
June	\$ 14,883.00	\$2,976,600.00	0.5%
July	14,883.00	2,976,600.00	0.5%
August	14,883.00	2,976,600.00	0.5%

September	14,883.00	2,976,600.00	0.5%
October	14,883.00	2,976,600.00	0.5%
November	14,883.00	2,976,600.00	0.5%
December	29,766.00	2,976,600.00	1.0%
	<hr/>		<hr/>
	\$119,064.00		4.0%
	<hr/>		<hr/>

VI.

Thereafter, and on or about December 26, 1935, defendant, relying upon the provisions of Section 213 of the National Industrial Recovery Act of June 16, 1933, assessed against plaintiff additional taxes not theretofore paid by plaintiff on the basis of five per cent of dividend payments aggregating \$119,064.00 made by plaintiff on its common stock, as stated in particular in paragraph V hereof. The additional taxes thus assessed by defendant, including interest to December 30, 1935, were as follows:

On dividends paid in month of 1933	Tax Assessed	Interest Assessed
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	1,488.30	309.79
	<hr/>	<hr/>
Total	\$5,953.20	\$1,395.57

Total Taxes and Interest	\$7,348.77
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VII.

Thereafter, and on or about December 28, 1935, plaintiff paid to defendant, as Collector of Internal Revenue for the District of Oregon, said taxes and interest so assessed in the total amount of \$7,348.77; but said payment was made under specific protest, which was made to defendant at the time of said payment, in form as follows:

“Payment of the above mentioned taxes is made under specific protest and duress and to avoid the seizure and sale of our property under warrant of distraint. It is our claim that the dividends in respect of which the above mentioned taxes are imposed were legally declared prior to the effective date of the taxing act, and that the assessment of these taxes against us is unlawful and improper. We shall hereafter file claim for refund of the taxes herewith paid.”

VIII

Thereafter, and on or about February 21, 1936, and within the time allowed by law, plaintiff presented to and filed with the Commissioner of Internal Revenue its claim upon Form 843 of the United States Treasury Department, Internal Revenue Service, provided for said purpose, for refund of \$6,449.72, being a part of said

\$7,348.77, taxes and interest so paid under protest as stated in paragraph VII hereof. The said amount of \$6,449.72 was made up of (a) \$5,209.05, which is 5 per cent of all dividends paid by plaintiff on its common stock, as stated in paragraph V hereof, not in excess of one-half of one per cent, in any single month, of the par value of common stock outstanding in said month, and (b) \$1,240.67, interest as paid by plaintiff on said sum of \$5,209.05. In particular said amount of \$6,449.72 included taxes and interest as assessed by defendant and as paid by plaintiff, as shown in the following table:

On dividends paid in month of 1933	Tax Assessed and Paid	Interest Assessed and Paid
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	744.15	154.89
	<hr/>	<hr/>
Total	\$5,209.05	\$1,240.67
	<hr/>	<hr/>
Total Taxes and Interest		\$6,449.72
		<hr/>

IX.

Thereafter, by letter dated March 27, 1936, ad-

dressed and mailed to plaintiff, the Deputy Commissioner of Internal Revenue advised plaintiff that said claim for refund would be disallowed. Thereafter, as required by law, by letter dated May 22, 1936, addressed to plaintiff at 1233 American Bank Building, Portland, Oregon, forwarded by registered United States mail, the Commissioner of Internal Revenue notified plaintiff that said claim for refund was disallowed or rejected.

X.

Total dividends paid by plaintiff during the calendar year 1933, subsequent to January 16, 1933, were as follows:

To holders of plaintiff's common stock	\$193,492.00
To holders of plaintiff's preferred stock	7,504.00
	<hr/>
Total	\$200,996.00

XI.

During the year 1933 plaintiff's earned surplus, available for dividends payable thereafter, as of the last day of certain months, was as shown in the following table:

As of last day of 1933	Earned Surplus
May	\$724,125.81
June	707,366.81

July	692,390.01
August	677,507.01
September	660,841.81
October	645,958.81
November	631,075.81
December	546,515.12

At all times during the year 1933 plaintiff had earnings and profits accumulated subsequent to February 28, 1913, in excess of \$300,000.00. At all times during the year 1933 there was money available in plaintiff's treasury to pay dividends on its common stock in amounts not less than one-half of one per cent per month on all outstanding common stock.

XII.

No part of said additional taxes amounting to \$5,209.05, or interest thereon amounting to \$1240.67, has been refunded to plaintiff.

It is further stipulated and agreed that this stipulation may be introduced by either of the parties hereto for the purpose of establishing the facts herein stipulated.

And this stipulation is solely for the purpose of establishing the facts stipulated, but both parties reserve the right to object to the reception in evidence of any fact herein recited upon the ground of lack of materiality.

Charles E. McCulloch

Fletcher Rockwood

Carey, Hart, Spencer & McCulloch

Attorneys for Plaintiff.

J. Mason Dillard

Of Attorneys for Defendant.

Filed June 19, 1937

G. H. Marsh, Clerk.

By H. S. Kenyon, Deputy.

**In the District Court of the United States
For the District of Oregon**

BE IT REMEMBERED, That on Monday, the 21st day of June, 1937, the same being the 85th Judicial day of the Regular March, 1937, Term of said Court, the following proceedings, among others, were had before the Honorable James Alger Fee, United States District Judge, for said District, to wit:

Western Cooperage Company,

vs.

J. W. Maloney, Collector of Internal
Revenue of the United States.

} **No. L-12799**
} **June 21, 1937**

Now at this day comes the plaintiff by Mr. Charles E. McCulloch and Mr. Fletcher Rockwood, of counsel, and the defendant by Mr. J. Mason Dillard, Assistant

United States Attorney. Whereupon this cause comes on to be tried before the court without the intervention of a jury pursuant to the stipulation of the parties hereto on file herein, the evidence in this cause being submitted to the court on a stipulation of facts filed herein. Whereupon plaintiff moves the court for special findings and judgment in its favor, and the defendant moves the court for judgment in his favor, and the court having heard the arguments of counsel, will advise thereof. Upon motion of the respective parties hereto,

IT IS ORDERED that the plaintiff be and is hereby allowed one week from this date within which to file its brief, that the defendant be and he is hereby allowed thirty days thereafter within which to file his answering brief and that plaintiff be and is hereby allowed fifteen days thereafter within which to file its reply brief herein.

AND AFTERWARDS, to wit, on the 5th day of August, 1937, there was duly FILED in said Court,

DEFENDANT'S REQUEST

for findings of fact and conclusions of law in words and figures as follows, to wit:

Comes now the defendant by its attorney, Carl C.

Donaugh, United States Attorney in and for the District of Oregon, and at the close of all the evidence and before the decision of the Court, requests the Court to find the facts as stipulated by the parties. The defendant respectfully requests that the Court decide as conclusions of law the following:

I

That the tax sought to be recovered in this action was lawfully and legally assessed and collected.

II

That the resolution of January 16, 1933, did not create as a matter of law a debtor and creditor relationship between plaintiff corporation and its shareholders for the payment of a dividend or dividends.

III

That the complaint sets forth no facts which are sufficient to entitle plaintiff to recover in this action.

IV

That the Commissioner of Internal Revenue properly disallowed plaintiff's claim for refund.

V

That under the laws and the evidence the record does not contain any substantial evidence to support

findings of fact and conclusions of law and judgment in favor of plaintiff and against defendant.

VI

That on the pleadings, stipulation of facts and evidence in this case, the defendant is entitled to a judgment dismissing plaintiff's complaint at plaintiff's cost.

That in the event of the refusal of the Court to make any of these findings of fact and conclusions of law, it is respectfully requested that the defendant may be granted an exception or exceptions.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney.

J. Mason Dillard
Assistant United States Attorney.

UNITED STATES OF AMERICA,)
DISTRICT OF OREGON.) ss.

Service of the within REQUEST FOR FINDINGS is accepted in the State and District of Oregon this 4th day of August, 1937, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

Fletcher Rockwood
Of Attorneys for Plaintiff

The within Findings of Fact and Conclusions of Law requested by defendant are refused and defendant is allowed an exception thereto.

Dated July 5, 1938.

Claude McCulloch

District Judge

Filed August 5, 1937

G. H. Marsh, Clerk.

By F. L. Buck, Chief Deputy.

AND AFTERWARDS, to wit, on the 23rd day of June, 1938, there was duly FILED in said Court,

TRANSCRIPT

of proceedings in words and figures as follows, to wit:

In the District Court of the United States

For the District of Oregon

WESTERN COOPERAGE

COMPANY, a corporation,

Plaintiff,

vs.

JAMES W. MALONEY, Collector

of Internal Revenue of the United

States for the District of Oregon,

Defendant.

No. L-12799

Portland, Oregon, June 21, 1937.

2:12 P. M.

BEFORE: Honorable James Alger Fee, Judge.

APPEARANCES:

Messrs. Carey, Hart, Spencer & McCulloch
(By Messrs. Fletcher Rockwood and
Charles E. McCulloch) Attorneys for
Plaintiff;

Mr. S. Mason Dillard, Assistant United
States Attorney, Attorney for the De-
fendant.

Cloyd Rauch, Court Reporter.

PROCEEDINGS

THE COURT: You may proceed.

MR. ROCKWOOD: I will make a very brief statement, Your Honor, what this case is about, Western Cooperage Company vs. Maloney, Collector. This is a case brought against the Collector of Internal Revenue to collect from him taxes assessed and collected by the Collector under Section 213 of the National Industrial Recovery Act. The Recovery Act imposed a five per cent excise tax on dividends of corporations, with the exception expressly stated in the act that the tax imposed by this section was not applied to dividends declared before the date of the enactment of this act. The act became effective on June 16th, 1933. The

dividends in question were paid by the Western Cooperage Company during the months of June, July, August, September, October, November and December of 1933. On January 16th, 1933, prior to the effective date of the act, the corporation adopted a resolution which reads as follows:

“RESOLVED, that the Secretary and Treasurer of this company be and he is hereby authorized, empowered and directed to pay monthly dividends of one-half of one per cent a month for the year 1933 whenever in his judgment there are moneys available to pay the same, and, further, that whenever in the judgment of the Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends.”

The dividends which were paid by the plaintiff during the months of June to December, 1933 were one-half of one per cent per month on its outstanding common stock, with the exception of the month of December, when a dividend of one per cent was paid. The additional tax was assessed at the rate of five per cent on the dividends as paid from June to December. The claim for refund asked for the refund of taxes paid on those divi-

dends which did not amount in excess of one-half of one per cent in any month, so that the claim for refund was for an amount slightly less than the additional taxes assessed.

In this suit we are seeking to recover the principal of the tax and interest thereon based on five per cent of one-half of one per cent per month of the common stock outstanding. The sole issue in this case, I believe, will be one of law, that is, whether the resolution of January 16th, 1933 constituted a declaration of a dividend prior to the effective date of the Recovery Act, which, as I say, became effective in June, 1933.

All of the facts in this case, with one exception, which I will want to comment on when we begin to make the record, have been stipulated with the attorney for the United States, so that there is no evidence to be received other than the stipulation and one additional matter on which I will stipulate orally with Mr. Dillard when we proceed after he makes a statement if he wishes to.

MR. DILLARD: If the Court please, we have nothing further to add to counsel's statement of the case. The position of the Government will be that that resolution as set forth in the complaint is insufficient as a declaration of dividends as contended by the plaintiff. We would like to offer—per-

half I can say at this time, before counsel finishes his statement, the stipulation of facts has been submitted to the Court, and since the drafting of that stipulation the Attorney General has communicated with our office and called our attention again to that matter, which we feel is perfectly clear upon the stipulation itself, but that is this, that the Attorney General has suggested that we should not stipulate anything that would be an admission that we considered the resolution sufficient. I believe it is perfectly plain from the stipulation itself, but this suggestion was made, and I would like to make the position of the Government clear in regard to it, that nothing stipulated in the written stipulation shall be considered as an admission by the defendant that the resolution of January 16, 1933 was sufficient as a declaration of dividends.

MR. ROCKWOOD: Well, if Your Honor please, that is quite satisfactory to me, that the stipulation as signed by the Government may be so construed, that it does not constitute an admission by the Government of that which I believe is a conclusion of law.

May I have, Mr. Clerk, the original of the stipulation, so that I may offer it in evidence at this time. If Your Honor please, I offer in evidence the document which is marked as filed in the office

of this Clerk on June 19, 1937, entitled "Stipulation of Facts".

THE COURT: No objection on the part of the government? The stipulation is admitted.

(The stipulation referred to, so offered and received, was thereupon marked received as PLAINTIFF'S EXHIBIT 1.)

MR. ROCKWOOD: Now, if Your Honor please, Mr. Dillard has agreed with me that it may be stipulated orally that the plaintiff's outstanding common stock remained constant during the entire calendar year 1933 in the amount of \$2,976,600. There is no objection to that stipulation, is there?

MR. DILLARD: No objection.

MR. ROCKWOOD: With that the plaintiff rests.

MR. DILLARD: And we would like the record to show, if Your Honor please, a motion for Judgment on behalf of the defendant.

MR. ROCKWOOD: If Your Honor please, the plaintiff moves the Court for special findings of fact in accordance with the facts as contained in the stipulation of facts offered in evidence, supplemented with the fact as stated in the oral stipulation just made with counsel.

Plaintiff also moves for a judgment in its favor, upon the ground that the entire record will support no judgment other than a judgment in favor of the plaintiff as prayed for in its complaint.

Now, if Your Honor please, I am prepared to argue this matter orally if your Honor wishes to hear me. If you prefer, I will present my argument in a written memorandum, which I will be able to file within a week,—whichever you prefer.

THE COURT: I would prefer that it be submitted on written memoranda from your side and from the Government's, and then subsequently if I feel that there is necessity for oral argument I will have it.

MR. ROCKWOOD: Very well, I will have mine served on counsel and filed within a week, if that is satisfactory.

THE COURT: How much time will you want?

MR. DILLARD: Well, in these cases, Your Honor, the Attorney General takes part, generally, in preparation of memoranda of this kind, so that after the filing of the plaintiff's memorandum I would like to ask for as much as thirty days for our answering memorandum.

MR. ROCKWOOD: That is satisfactory. And

may I have fifteen days to reply to the Government's memorandum?

THE COURT: Yes. Anything further?

MR. ROCKWOOD: That concludes it.

THE COURT: The Court will take the case under advisement. The Court is now adjourned until tomorrow morning at ten o'clock.

(Whereupon, at 2:25 o'clock P. M., June 21, 1937, oral proceedings in the above entitled matter were concluded, the Court taking the case under advisement.)

CERTIFICATE

UNITED STATES OF AMERICA	}	ss.
State of Oregon,		
County of Multnomah.		

I, Cloyd Rauch, hereby certify that I reported in shorthand the proceedings had at the trial of the above entitled cause on June 21, 1937, that I subsequently reduced my said shorthand notes to typewriting, and that the foregoing and hereto attached 5 pages of typewritten matter, numbered from 2 to 6, both inclusive, constituted a full, true and accurate transcript of said proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 21st day of June, 1938.

Cloyd Rauch
Reporter

Filed June 23, 1938.

G. H. Marsh, Clerk.

By F. L. Buck, Chief Deputy.

AND AFTERWARDS, to wit, on the 23rd day of June, 1938 there was duly FILED in said Court, a

STIPULATION

in words and figures as follows, to wit:

It is hereby STIPULATED by and between the parties hereto through their respective attorneys of record as follows:—

On June 21, 1937, this cause came on for trial before the Honorable James Alger Fee, one of the judges of the above entitled court. At that time proceedings were had as set forth in "Transcript of Proceedings", certified by Cloyd Rauch, reporter, hereto attached and by this reference made a part of this stipulation.

Thereafter, the Honorable James Alger Fee referred this cause for disposition to the Honorable Claude McColloch, one of the judges of the above entitled court.

On June 22, 1938, the parties hereto appeared be-

fore the Honorable Claude McColloch by and through their attorneys of record and stipulated orally in open court that the matter should be considered and disposed of by the Honorable Claude McColloch as though proceedings were had on June 22, 1938, before the Honorable Claude McColloch precisely the same as those which were had on June 21, 1937, before the Honorable James Alger Fee, as set forth in said Transcript of Proceedings, which was at that time presented to the Honorable Claude McColloch; and in particular, at said time and place stipulated orally that the motion for judgment in its favor made by plaintiff and the motion for special findings of fact made by plaintiff as set forth in said Transcript of Proceedings were both specifically made and renewed to the Honorable Claude McColloch, and further, that the motion for judgment for defendant made by defendant as set forth in said Transcript of Proceedings was made and renewed to the Honorable Claude McColloch.

It was further stipulated orally that the parties should reduce to written form the oral stipulation made in open court at said time and place before the Honorable Claude McColloch and this written stipulation is specifically for the purpose of reducing to writing and making a matter of record the oral stipulation as made in open court at said time and place before the Honorable Claude McColloch.

Charles E. McColloch

Fletcher Rockwood

Carey, Hart, Spencer & McColloch

Attorneys for Plaintiff

J. Mason Dillard

Attorney for Defendant

Filed June 23, 1938

G. H. Marsh, Clerk.

By F. L. Buck, Chief Deputy.

In the District Court of the United States

For the District of Oregon

BE IT REMEMBERED, That on Tuesday, the 5th day of July, 1938 the same being the 2nd Judicial day of the Regular July 1938 Term of said Court, the following proceedings, among others, were had before the Honorable Claude McColloch, United States District Judge, for said District, to wit:

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

The above entitled cause came on for trial before the court without the intervention of a jury, the parties hereto having signed and filed prior to the date of trial, a written stipulation that the action be tried before the court without a jury, and the parties having by said stipulation so filed, waived a jury. Plaintiff appeared

by Charles E. McCulloch, Fletcher Rockwood and Messrs. Carey, Hart, Spencer and McCulloch, its attorneys, and defendant appeared by Carl C. Donough, United States attorney, and S. Mason Dillard, Assistant United States attorney, his attorneys. The court having heard the testimony offered, and having considered the briefs filed on behalf of the respective parties, and having heard oral argument, makes the following:

FINDINGS OF FACT

I.

Plaintiff is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Oregon, with its principal office at American Bank Building, in the City of Portland, Oregon.

II.

Defendant is and at all times since July 17, 1933, has been the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the District of Oregon.

III.

On or about January 16, 1933, the Board of Directors of plaintiff, at the regular annual meeting of said Board, at which a quorum of said Board was present,

duly adopted and passed a resolution, as follows:

“Resolved, that the Secretary and Treasurer of this Company be and he is hereby authorized, empowered and directed to pay monthly dividends of $\frac{1}{2}$ of 1% each month for the year 1933 whenever in his judgment there are moneys available to pay the same and further that whenever in the judgment of said Secretary and Treasurer there are moneys available to increase the amount of said dividends for any month or months thereof, said Secretary and Treasurer is hereby authorized, empowered and directed to pay such additional dividends.”

IV.

The resolution of January 16, 1933, hereinbefore quoted, was identical in form and substance with resolutions adopted in previous years. Under those resolutions plaintiff had paid dividends amounting to one-half of one per cent each month on its common stock during the entire period from January, 1925, to the close of the year 1933.

V.

Subsequent to June 16, 1933, and prior to December 31, 1933, plaintiff, without a further resolution, paid dividends to holders of its common stock from time to time issued and outstanding in total amounts as shown in the following table:

Paid in month of	Total divi- dend paid	Par value stock on which divi- dend paid	Per cent of dividend paid
1933			
June	\$ 14,883.00	\$2,976,600.00	0.5%
July	14,883.00	2,976,600.00	0.5
August	14,883.00	2,976,600.00	0.5
September ..	14,883.00	2,976,600.00	0.5
October	14,883.00	2,976,600.00	0.5
November ..	14,883.00	2,976,600.00	0.5
December ..	29,766.00	2,976,600.00	1.0
	\$119,064.00		4.0%

VI.

Thereafter, and on or about December 26, 1935, defendant, relying upon the provisions of Section 213 of the National Industrial Recovery Act of June 16, 1933, assessed against plaintiff additional taxes not theretofore paid by plaintiff on the basis of five per cent of dividend payments aggregating \$119,064.00 made by plaintiff on its common stock, as stated in particular in paragraph V hereof. The additional taxes thus assessed by defendant, including interest to December 30, 1935, were as follows:

On dividends paid in month of	Tax Assessed	Interest Assessed
1933		
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	1,488.30	309.79
	<hr/>	<hr/>
Total	\$5,953.20	\$1395.57
	<hr/>	<hr/>
Total Taxes and Interest.....		<u>\$7,348.77</u>

VII.

Thereafter, and on or about December 28, 1935, plaintiff paid to defendant, as Collector of Internal Revenue for the District of Oregon, said taxes and interest so assessed in the total amount of \$7,348.77; but said payment was made under specific protest, which was made to defendant at the time of said payment, in form as follows:

“Payment of the above mentioned taxes is made under specific protest and duress and to avoid the seizure and sale of our property under warrant of distraint. It is our claim that the dividends in respect of which the above mentioned taxes are imposed were legally declared prior to the effective date of the taxing act, and that the assessment of

these taxes against us is unlawful and improper. We shall hereafter file claim for refund of the taxes herewith paid.”

VIII.

Thereafter, and on or about February 21, 1936, and within the time allowed by law, plaintiff presented to and filed with the Commissioner of Internal Revenue its claim upon Form 843 of the United States Treasury Department, Internal Revenue Service, provided for said purpose, for refund of \$6,449.72, being a part of said \$7,348.77, taxes and interest so paid under protest as stated in paragraph VII hereof. The said amount of \$6,449.72 was made up of (a) \$5,209.05, which is 5 per cent of all dividends paid by plaintiff on its common stock, as stated in paragraph V hereof, not in excess of one-half of one per cent, in any single month, of the par value of common stock outstanding in said month, and (b) \$1,240.67, interest as paid by plaintiff on said sum of \$5,209.05. In particular said amount of \$6,449.72 included taxes and interest as assessed by defendant and as paid by plaintiff, as shown in the following table:

On dividends paid in month of	Taxes Assessed and Paid	Interest Assessed and Paid
1933		
June	\$ 744.15	\$ 199.53
July	744.15	192.09
August	744.15	184.75
September	744.15	177.21
October	744.15	169.87
November	744.15	162.33
December	744.15	154.89
	<hr/>	<hr/>
Total	\$5,209.05	\$1,240.67
	<hr/>	<hr/>
Total Taxes and Interest.....		<u><u>\$6,449.72</u></u>

IX.

Thereafter, by letter dated March 27, 1936, addressed and mailed to plaintiff, the Deputy Commissioner of Internal Revenue advised plaintiff that said claim for refund would be disallowed. Thereafter, as required by law, by letter dated May 22, 1936, addressed to plaintiff at 1233 American Bank Building, Portland, Oregon, forwarded by registered United States mail, the Commissioner of Internal Revenue notified plaintiff that said claim for refund was disallowed or rejected.

X.

Total dividends paid by plaintiff during the cal-

endar year 1933, subsequent to January 16, 1933, were as follows:

To holders of plaintiff's common stock	\$193,492.00
To holders of plaintiff's preferred stock	7,504.00
	<hr/>
Total.....	\$200,996.00

XI.

During the year 1933 plaintiff's earned surplus, available for dividends payable thereafter, as of the last day of certain months, was as shown in the following table:

As of last day of	Earned Surplus
1933	
May	\$ 724,125.81
June	707,366.81
July	692,390.01
August	677,507.01
September	660,841.81
October	645,958.81
November	631,075.81
December	546,515.12

At all times during the year 1933 plaintiff had earnings and profits accumulated subsequent to February 28, 1913, in excess of \$300,000.00. At all times during the year 1933, there was money available in plaintiff's treasury to pay dividends on its common stock in amounts

not less than one-half of one per cent per month on all outstanding common stock.

XII.

During the entire calendar year 1933, plaintiff's outstanding common stock remained constant in the amount of \$2,976,600.00 par value.

XIII.

No part of said additional taxes amounting to \$5,209.05, or interest thereon amounting to \$1240.67, has been refunded to plaintiff.

Based on the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I.

The tax and interest thereon sought to be recovered in this action was unlawfully and irregularly assessed and collected.

II.

The resolution of January 16, 1933, was a valid declaration of a dividend within the meaning of Section 213 of the National Industrial Recovery Act of June 16, 1933, and created a debtor and creditor relationship between plaintiff and its stockholders for the

payment of a dividend to the amount of one-half of one per cent per annum throughout the calendar year 1933, including the months of June to December, inclusive, of that year.

III.

The Commissioner of Internal Revenue improperly disallowed plaintiff's claim for refund.

IV.

On the pleadings and evidence in this case, plaintiff is entitled to judgment against defendant in the sum of \$6,449.72, together with interest thereon at six per cent per annum from December 28, 1935.

V.

There was probable cause for the collection by defendant of the above mentioned tax and interest thereon, and in making such collection defendant acted under the directions of the Commissioner of Internal Revenue of the United States.

To which conclusions of law the defendant excepts and exception is allowed.

Dated: July 5th, 1938.

Claude McColloch
District Judge

STATE OF OREGON,)
County of Multnomah.) ss.

Due service of the within Findings of Fact and Conclusions of Law is hereby accepted at Portland, Oregon, this day of July, 1938 by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Plaintiff.

J Mason Dillard
Of Attorneys for Defendant

Filed July 5, 1938
G. H. Marsh, Clerk.
R. DeMott, Deputy.

**In the District Court of the United States
For the District of Oregon**

BE IT REMEMBERED, That on Tuesday, the 5th day of July, 1938, the same being the 2nd Judicial day of the Regular July, 1938 Term of said Court, the following proceedings, among others, were had before the Honorable Claude McColloch, United States District Judge, for said District, to wit:

JUDGMENT

The above entitled action having been duly tried and findings of fact and conclusions of law having been duly made and entered determining that plaintiff is en-

titled to judgment against defendant in the sum of \$6,449.72, with interest thereon at six per cent per annum from December 28, 1935,

It is ORDERED AND ADJUDGED that plaintiff have and recover from defendant the sum of \$6,449.72, together with interest thereon at six per cent per annum from December 28, 1935.

Dated: July 5th, 1938.

Claude McColloch

District Judge

STATE OF OREGON,)
County of Multnomah.) ss.

Due service of the within Judgment is hereby accepted at Portland, Oregon, this day of July, 1938 by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Plaintiff.

J Mason Dillard

Attorney for Defendant

Filed July 5, 1938

G. H. Marsh, Clerk.

By R. DeMott, Clerk.

AND AFTERWARDS, to wit, on the 4th day of October, 1938, there was duly FILED in said Court, a

NOTICE OF APPEAL

in words and figures as follows, to wit:

To the above-named plaintiff, Western Cooperage Company, and his attorneys, Carey, Hart, Spencer and McCulloch and Fletcher Rockwood:

YOU AND EACH OF YOU will take notice that the defendant, James W. Maloney, Collector of Internal Revenue of the United States for the District of Oregon, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above-entitled cause and court and signed by the Honorable Claude McCulloch, one of the judges of said District Court, on the 8th day of June, 1938, which judgment is to the effect that the plaintiff shall have and recover from the defendant the sum of \$6,449.72, together with interest thereon at six per cent per annum from December 28, 1935, and costs and disbursements taxed in the sum of \$20.00, and the defendant appeals from the whole of said judgment.

Dated this 4th day of October, 1938.

CARL C. DONAUGH

United States Attorney for
the District of Oregon

J. Mason Dillard

Assistant United States Attorney

Filed October 4, 1938

G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 25th day of October, 1938, there was duly FILED in said Court, a

PRAECIPE

for transcript in words and figures as follows, to wit:
TO G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon:

You will please prepare and certify the transcript of record in the above-entitled cause, to consist of the following:

Complaint

Answer

Stipulation for Trial Without a Jury

Stipulation of Facts

Order of June 21, 1937

Stipulation filed June 23, 1938

Transcript of Evidence

Defendant's Request for Findings of Fact and
Conclusions of Law (Filed August 5, 1937)

Findings of Fact and Conclusions of Law

Judgment

Notice of Appeal

Praecipe for Transcript

Dated this 24th day of October, 1938.

CARL C. DONAUGH

United States Attorney for
the District of Oregon

J. Mason Dillard
Assistant United States Attorney

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

Service of the within PRAECIPE FOR TRANSCRIPT is accepted in the State and District of Oregon this 24th day of October, 1938, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

Carey, Hart Spencer & McCulloch
Of Attorneys for Plaintiff

Filed October 25, 1938

G. H. Marsh, Clerk.

By F. L. Buck, Chief Deputy.

